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Supreme Court of the United States

September Term, 1979

No. 79-392

MARION H. MORRIS, ET ALS.
CHARLES K. ADAMS, ET ALS.,
Petitioners,

v.

MAJOR GENERAL WILLIAM T. McCADDIN, et als.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
CONCISE STATEMENT OF CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	14

TABLE OF CITATIONS

Cases

Ainsworth v. *United States,* 399 F.2d 176 (Ct. Cl. 1968) 9, 10

Chambers v. *United States,* 451 F.2d 1045 (Ct. Cl. 1971) 9

Kellerman v. *United States,* 504 F.2d 1128 (Ct. Cl. 1974) . . . 9, 10

Kozak v. *United States,* 458 F.2d 39 (Ct. Cl. 1972) 9

Rasmussen v. *United States,* 543 F.2d 134 (Ct. Cl. 1976) 8

Service v. *Dulles,* 354 U.S. 363, 77 S. Ct. 1152, 1 L.Ed. 2d 1403 (1957) 11, 12

Shubinsky v. *United States,* 488 F.2d 1003 (Ct. Cl. 1973) 9

United States v. *Testan,* 424 U.S. 392, 47 L.Ed. 2d 114, 96 S. Ct. 948 (1976) 8, 9, 10

United States v. *Wickersham,* 201 U.S. 370, 50 L.Ed. 798, 26 S. Ct. 469 (1906) 10

United States ex rel. Accardi v. *Shaughnessy,* 347 U.S. 260, 98 L.Ed. 681, 74 S. Ct. 499 (1953) 11

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PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

The Petitioners, Marion H. Morris, et als., and Charles K. Adams, et als., pray that a Writ of Certiorari issue to review the opinion and judgment of the Fourth Circuit Court of Appeals of the United States rendered in these proceedings on May 10, 1979.

OPINIONS BELOW

Fourth Circuit. The opinion of the Court of Appeals for the Fourth Circuit affirming the order of the United States District Court for the Eastern District of Virginia (App. A, *infra,* App. 1) is an unpublished opinion.

The opinion of the Court of Appeals for the Fourth Circuit reversing in part the opinion of the United States District Court for the Eastern District of Virginia and remanding the case to the District Court (App. B, *infra,* App. 3) is reported at 553 F.2d 866 (4th Cir. 1977) in the official reports.

District Court. The opinion of the United States District Court for the Eastern District of Virginia on remand of the case from the Fourth Circuit (App. C, *infra,* App. 13) is an unpublished opinion.

The order of the United States District Court approving the schedule of reemployment submitted by the Respondents (App. D, *infra,* App. 17) is an unpublished order.

The opinion of the United States District Court for the Eastern District of Virginia reversed in part by the Fourth Circuit (App. E, *infra,* App. 18) is an unpublished opinion.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) to review the opinion and order of the Fourth Circuit Court of Appeals entered on May 10, 1979. On June 11, 1979, the Fourth Circuit denied the Petitioner's timely petition for a rehearing, and this Petition for Certiorari was filed within ninety (90) days of that date.

QUESTIONS PRESENTED

1. Whether the remedial provisions of 5 U.S.C. § 5596(b) ("Back Pay Act") apply to victims of an improper reduction-in-force conducted in violation of governing federal agency regulation?
2. Whether the remedies provided by 5 U.S.C. § 5596(b) are mandatory rather than discretionary modes of relief, granted as a matter of right to federal employees found under applicable law or regulation to have undergone unjustified personnel action resulting in the withdrawal or reduction of pay, allowances, or differentials of the employee?

3. Whether the Respondents were bound to follow the remedial provisions of the regulations adopted by the National Guard Bureau pursuant to 32 U.S.C. § 709, which regulations require that victims of an improper reduction-in-force be restored without loss of tenure or status to a position of like seniority, status and pay?
4. Whether 5 U.S.C. § 5596(b) and National Guard Bureau Regulation TPP-910 authorize and/or mandate the recovery by the federal employee of such emoluments as restoration of leave credit, restoration of seniority, retroactive retirement credit, vacation and insurance benefits, and similar benefits that the employee would have earned between the dates of the wrongful and corrected personnel actions?

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of the Back Pay Act, 5 U.S.C. § 5596, as amended, Pub. L. 94-172, § 1(a), Dec. 23, 1975, 89 Stat. 1025; Pub. L. 95-454, Title VII, § 702, Oct. 13, 1978, 92 Stat. 1216, as reprinted in pertinent part in App. F, *infra,* App. 34.

CONCISE STATEMENT OF THE CASE

This action was instituted under 5 U.S.C. § 702 in the United States District Court for the Eastern District of Virginia, Newport News Division, on October 11, 1974, by eighteen members of the Virginia Army National Guard, formerly employed as Air Defense technicians under the National Guard Technicians' Act in the Nike-Hercules Missile Program located in part in the Commonwealth of

Virginia. Nine additional members of the Virginia Army National Guard subsequently intervened as Party-Plaintiffs.

The action was brought against the Adjutant General of Virginia, the Secretary of Defense of the United States of America, the Secretary of the Army of the United States of America, and the Chief of the National Guard Bureau, challenging the manner in which the Defendants (Respondents herein) conducted a reduction-in-force when the Nike-Hercules Missile program was abandoned in February of 1974. In 1976 the parties submitted the question to the District Court on the issue of liability only. On April 21, 1976, the Honorable John A. MacKenzie issued a Memorandum Order dismissing the complaint, finding that the Defendants had not violated the law. The Plaintiffs (Petitioners herein) appealed to the Fourth Circuit Court of Appeals which, on April 21, 1977, reversed the District Court and found that the Defendants had abused their discretion in not following the regulations adopted by the National Guard Bureau for conducting the reduction-in-force. The Court of Appeals, going beyond the liability issues, remanded to the District Court for entry of an order directing the Defendants to prepare a schedule of reemployment, but no other relief. Both parties petitioned the Fourth Circuit Court of Appeals for a review of their decision, and both petitions were denied. Upon remand, the District Court approved the schedule of reemployment submitted by the Defendants and entered an order accordingly on July 27, 1978. The Plaintiffs appealed the District Court's order to the Fourth Circuit, which on May 10, 1979, affirmed the District Court's award of relief to the Plaintiffs. On June 11, 1979, the Fourth Circuit denied the Plaintiffs' timely petition for a rehearing.

In 1974, the Department of Defense announced that the Nike-Hercules Missile Program, located in part in the Commonwealth of Virginia, would be phased out beginning

February 4, 1974, and eliminated effective September 30, 1974. The 291 employees at the sites in Virginia were hybrid civil service employees known as Air Defense technicians, who also were required to be members of the Virginia Army National Guard, each being hired pursuant to 32 U.S.C. § 709. As a result of the elimination of this function all 291 employees were subject to losing their jobs.

Congress had anticipated this occurrence and had directed by 32 U.S.C. § 709 that the Secretary of the Army promulgate regulations to deal with a reduction-in-force. The operative regulation promulgated was "Technician Personnel Pamphlet 910" (hereinafter "TPP-910"). This regulation provided for, among other things, an extensive and intensive *placement* program designed to find jobs for the displaced technicians. The Fourth Circuit held that the Defendants, in instituting and implementing a *merit promotion* program, had violated the letter and spirit of TPP-910.

Accordingly, the Fourth Circuit Court of Appeals remanded the case to the District Court . . . "for entry of an appropriate order directing Defendants to prepare a schedule, subject to the Court's approval, offering employment or reemployment to Plaintiffs at no less than the grade each would have had if the competition for vacancies had been restricted to the displaced technicians in accordance with TPP-910." "However," stated the Court, "the United States will not be required to pay Plaintiffs for wages lost due to failure to receive jobs as they were entitled, nor will Defendants be held individually liable." No authority, statutory or judicial, was cited by the Court to support its conclusion that the "wages lost" were not recoverable. On remand, the Respondents submitted an employment schedule prepared by listing in descending order, based upon varying rates of pay, vacancies which arose during the conduct of the reduction-in-force, and by matching this list of vacancies wtih a list of displaced

technicians prepared in descending order based upon the grade level of each displaced employee.[1] The Petitioners' pay grade and technician service date were the exclusive factors used in the selection of technicians to occupy authorized vacancies.[2] Containing bare offers of employment or reemployment, the schedule treated each Petitioner as a new employee without according him the benefit of any of the rights accumulated during his period of membership in the Virginia National Guard. The District Court refused to consider any order requiring back pay or the like. The Respondents' schedule of employment was approved as submitted by the District Court whose order was subsequently affirmed on appeal by the Fourth Circuit.

Chapter 7-5 of TPP-910 clearly sets forth the corrective action to be taken when a technician is separated improperly or otherwise is the victim of an improper reduction-in-force. Paragraph 7-5(f) of TPP-910 in pertinent part requires that the technician be restored "to the rolls, without loss of tenure or status when the technician was separated improperly." In such a case, "the technician must be. . . restored to the position he should have been assigned to in lieu of separation or one of like seniority, status and pay."[3]

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[1] In developing the schedule of job offerings, the Respondents failed to analyze the military pay and grade status of the displaced technicians, the general job duties performed by the individuals in the Air Defense Program, or the general job requirements for the identified positions that were available for placement. The Respondents' schedule also failed to provide for the possibility of rejection by any of the Petitioners of any of the job offers and the consequent availability of such rejected positions to other technicians.

[2] The Respondents' list of available jobs did not include all the then-existing vacancies.

[3] As it is virtually impossible to determine the positions each Petitioner would have had if the reduction-in-force had been properly conducted in 1974, it is the Petitioners' position that the second option contained in TPP-910 is the proper remedial measure: that is, each technician must be restored to a position of "like seniority, status and pay."

TPP-910 further defines as a "reasonable offer of assignment to a displaced technician. . . an assignment that preserves his present grade, step and salary, or his salary in a different pay plan." As part of the "make-whole" remedy, Section 7-7 of TPP-910 further provides that pay, allowances, or differentials lost to the technician as a result of improper reduction-in-force actions will be reimbursed upon correction of the action. Moreover, 5 U.S.C. § 5596(b) authorizes the retroactive recovery of pay, allowances, or differentials whenever a federal employee has "undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of" the compensation to which the employee is otherwise entitled.

As a result of the schedule of reemployment approved by the District Court and the Fourth Circuit, two of the Petitioners were not even offered jobs, although at the completion of the original reduction-in-force there were over 50 vacancies. Moreover, not a single Petitioner was offered a position of "like seniority, status, and pay" as required by TPP-910. Rather, in every case the Respondents' placement job offer failed to preserve the grade, step, and salary held by each Petitioner at the time of the reduction-in-force. Finally, all the Petitioners have been denied the back pay and other emoluments provided for in TPP-910 and in 5 U.S.C. § 5596 as remedies to federal employees who have undergone unjustified personnel action.[4]

Despite the failure of the reemployment schedule to accomplish any reasonable offers of assignment, the schedule was affirmed by the Fourth Circuit on the sole grounds that it is "rational." Again, the Court did not cite any case or other reason to support its decision.

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[4] Such emoluments include the following benefits: (a) lost wages, (b) restoration of leave credit, (c) credit towards retirement, (d) sick leave, (e) insurance benefits, (f) restoration of seniority.

REASONS FOR GRANTING THE WRIT

In the view of the Petitioners, the opinion of the Fourth Circuit deviates sharply from the decision of this Court in *United States* v. *Testan,* 424 U.S. 392, 47 L.Ed. 2d 114, 96 S.Ct. 948 (1976). In addressing the scope of coverage of 5 U.S.C. § 5596(b) (the Back Pay Act) in that case, this Court held that:

> The statute's language was intended to provide a monetary remedy for wrongful reductions in grade, removals, and suspensions, and "other unwarranted or unjustified actions affecting pay or allowances (that) could occur in the course of reassignments and change from full-time to part-time work. S Rep. No. 1062, 89th Cong. 2d Sess., 3(1966)." 47 L.Ed. 2d at 125, 424 U.S. at 405...."(T)he Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position"...424 U.S. 407, 47 L.Ed. 2d 126.

Although this Court has never explicitly so held, its opinion in *United States* v. *Testan, supra,* indicates that the Back Pay Act also authorizes the retroactive recovery of wages by those federal employees subjected to the withdrawal or reduction of pay and other allowances as a result of an improper reduction-in-force.

Furthermore, the Fourth Circuit's refusal to apply the Back Pay Act to the Petitioners as recognized victims of an improper reduction-in-force flatly contradicts numerous decisions of the United States Court of Claims. For example, in *Rasmussen* v. *United States,* 543 F.2d 134, 142 (Ct.C1. 1976), the Court of Claims held that "the Back Pay Act, 5 U.S.C. § 5596(b)(1970), now provides the vehicle for allowing back pay for an improper reduction-in-force." See

also *Kellerman* v. *United States,* 504 F.2d 1128 (Ct. Cl. 1974); *Shubinsky* v. *United States,* 488 F.2d 1003 (Ct. Cl. 1973); *Kozak* v. *United States,* 458 F.2d 39 (Ct. Cl. 1972); *Ainsworth* v. *United States,* 399 F.2d 176 (Ct. Cl. 1968).[8] The rationale articulated by the Court of Claims in those cases was that the assignment rights accorded federal employees upon removal by virtue of a reduction-in-force are "as important as, perhaps more important than, the validity of the abolishment" of the employee's job itself. *Rasmussen* v. *United States, supra,* 543 F.2d at 141.

In its denial of back pay relief to the adjudicated victims of wholly improper personnel action, the effect of the Fourth Circuit's opinion is to flatly contradict the purpose behind Congress's enactment of the Back Pay Act as that purpose was articulated by this Court in *United States* v. *Testan, supra.* This Court specifically noted the longstanding refusal by the federal courts to engage in judicial review of federal personnel actions in the absence of a statute authorizing such review. In view of this judicial history of invariably denying relief to federal employees, the enactment by Congress of the Back Pay Act was attributed special significance by this Court:

> Congress, of course, now has provided specifically in the Lloyd-LaFollette Act, 5 U.S.C. § 7501 (5 U.S.C.S. § 7501), for administrative review of a claim of wrongful adverse action, and in the Back Pay Act for the award of money damages for a wrongful deprivation of pay. 47 L.Ed. 2d at 126, 424 U.S. at 406.

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[8] *In Chambers* v. *United States,* 451 F.2d 1045, (Ct. Cl. 1971), the Court of Claims stated that back pay is an appropriate monetary remedy to federal employees despite the absence of administrative regulations not expressly so providing. In the instant case, TPP-910 expressly provides for the recovery of lost wages by victims of an improper reduction-in-force.

Although noting that "federal agencies continue to have discretion in most matters relating to the terms and conditions of federal employment," 424 U.S. 406, this Court's opinion in *United States* v. *Testan, supra,* strongly suggests that enactment of the Back Pay Act eliminated that discretion with respect to the appropriate remedy for improper personnel action.

The failure of the Fourth Circuit to recognize the Petitioners' entitlement to such emoluments as wages lost, retroactive retirement credit, restoration of leave credit, and seniority as if the unjustified personnel action had not occurred, is also violative of the plain language of the Back Pay Act. Indeed, 5 U.S.C. § 5596(b)(1)(B) provides that the employee is deemed, for all purposes, to have performed services during the period of the unjustified personnel action. Moreover, the language of that section clearly indicates that the employee is entitled to credit for "leave." Various decisions of the United States Court of Claims are also plainly inconsistent with the Fourth Circuit's denial of relief to the Petitioners. For example, in *Ainsworth* v. *United States,* 399 F.2d 176 (Ct.C1. 1968), it was held that a service employee who was wrongfully separated subsequent to an invalid reduction-in-force was entitled to credit for the hours of annual leave which would have accumulated absent the wrongful personnel action. Similarly, the Court of Claims has stated that adjustment in retirement rate by reason of salary lost during an improper reduction-in-force is a proper measure of recovery under the Back Pay Act. *Kellerman* v. *United States,* 504 F.2d 1128 (Ct. Cl. 1974). Indeed, this Court has stated as a general principle that a federal employee is entitled to all the emoluments of his position until he has been legally disqualified. *United States* v. *Testan, supra; United States* v. *Wickersham,* 201 U.S. 370, 50 L.Ed. 798, 26 S.Ct. 469 (1906). The time has come for this Court

to fully define the extent of recovery accorded federal employees entitled to the protection of the Back Pay Act.

The instant case thus presents an ideal vehicle for this Court to give the United States government and those federal employees affected by the Act some authoritative guidelines as to the Act's true application and coverage. In the context of this case, the Court will be called upon to amplify the remedies authorized by the Back Pay Act, as well as to delineate the scope of its coverage. Moreover, this Court will be squarely faced with the issue of whether the Act's remedial provisions mandate their application to covered employees. The resolution of these issues is of manifest practical importance to all federal agencies and their employees alike.

The Petitioners recognize that should this Court grant this petition, it would be by reason of the issues which this case raises as to the coverage and meaning of the Back Pay Act. However, Petitioners respectfully request that this Court, as a corollary to its review of the "back pay" and "emoluments" issues, examine the reemployment schedule prepared by the Respondents for its compliance with TPP-910, the governing federal regulation. Such examination by this Court to determine whether there has been violation of pertinent government regulations applicable to termination of federal employment would not be unprecedented. *Service* v. *Dulles,* 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957). As did the Petitioners in *Service* v. *Dulles supra,* your Petitioners respectfully submit that the Fourth Circuit's opinion affirming the reemployment schedule submitted by the Respondents is subject to attack under the principle established by this Court's decision in *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260, 98 L.Ed. 681, 74 S. Ct. 499 (1953). That is,

> that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature. *Service* v. *Dulles, supra* 354 U.S. at 372.

Although the Fourth Circuit has held that Petitioners were victims of an improper reduction-in-force resulting in violation of their vital rights of reassignment and in total disruption of their very livelihoods, your Petitioners have been totally deprived of the remedies to which they are entitled under the Back Pay Act and under TPP-910. If the Fourth Circuit's opinion is permitted to stand as judicial precedent, the travesty of justice which has resulted to your Petitioners could very well be extended to the innumerable other federal government employees who will, in the future, undergo unjustified personnel actions. Petitioners respectfully submit that the following results, which could flow from the opinion of the Fourth Circuit, are not consonant with the language of the Back Pay Act or with the prior decisions of this Court:

1. That the remedial provisions of the Back Pay Act do not apply to victims of an improper reduction-in-force conducted in violation of governing federal agency regulation.
2. That, in enacting the Back Pay Act, Congress intended to endow federal agency employers with total discretion in determining the remedy to be granted federal employees found under applicable law or regulation to have undergone unjustified personnel action resulting in the withdrawal or reduction of pay.
3. That, in providing in the Back Pay Act that the

> employee is deemed, for all purposes, to have performed services during the period of the unjustified personnel action, Congress did not intend that the federal employee could recover such emoluments as restoration of seniority, vacation and insurance benefits, and other benefits that the employee would have earned had the wrongful personnel action not occurred.

4. That federal government agencies are not bound to follow agency regulations designed to preserve the rights of federal employees upon separation from the agency or upon termination of their employment.

Petitioners are mindful of the heavy docket of this Court. However, we present to the Court statutory interpretation questions which go to the marrow of the problem of government agencies seeking to assert their discretion in an area where Congress has manifested an intent to eliminate that discretion. The resolution of the issues presented by this case is of vital practical importance to the very livelihoods of all federal government employees who will undergo unjustified personnel action. Petitioners represent that they are aggrieved and need the protection and guidance of this Court.

CONCLUSION

The present case presents a serious misapplication of the law in an area of law where this Court should speak. It also presents a case of clear conflict between the Fourth Circuit and the Court of Claims. Petitioners therefore respectfully request this Court to grant this petition.

Respectfully submitted,

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September 7, 1979

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1592

MARION H. MORRIS, et al.,

Appellants,

versus

MAJOR GENERAL WILLIAM T. McCADDIN, et al.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. MacKenzie, District Judge

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Argued April 3, 1979 Decided May 10, 1979

Before HAYNSWORTH, Chief Judge, BREITENSTEIN*, Senior Circuit Judge, and RUSSELL, Circuit Judge

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PER CURIAM:

Earlier a panel of this court found that plaintiffs were wrongfully terminated from their jobs in the Virginia Army National Guard, and ordered that an appropriate schedule of reemployment be prepared to remedy their injury. 553 F.2d 866 (4th Cir. 1977). Upon remand, the defendant constructed a schedule of reemployment matching the most attractive and highest paying jobs with the most qualified individuals. The district court approved the schedule, and plaintiffs appeal.

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*Senior Circuit Judge for the Tenth Circuit, Sitting by Designation.

We find no error in the trial court's approval of the reemployment schedule. The methodology employed in constructing the schedule was rational, and based upon reasonable assumptions about the jobs and the workers. Accordingly, we affirm the district court's award of relief.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1592

MARION H. MORRIS, et al.,
Appellants,

versus

MAJOR GENERAL WILLIAM T. McCADDIN, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. Mackenzie, District Judge

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Argued January 12, 1977 Decided April 21, 1977

OPINION AND ORDER

K. K. HALL, Circuit Judge:

Eighteen plaintiffs filed suit in federal court alleging that certain actions taken by defendants violated statutes, regulations and directives of the United States regarding a reduction in force (hereinafter "RIF") in the Nike-Hercules Missile Program in the Commonwealth of Virginia. All plaintiffs are members of the Virginia Army National Guard and were employees in that missile program. The defendants are the Adjutant General of the Virginia National Guard, the Secretary of Defense, the Secretary of the Army, and the Chief of the National Guard Bureau. The district court

refused the relief sought on the basis that the Virginia Adjutant General acted within his discretionary authority in effecting the RIF. We reverse.

I.

The plaintiffs were employed in the air defense Nike-Hercules program pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. § 709, a program existing in ten states within the United States. On February 4, 1974, the Department of Defense announced the country-wide elimination of the Nike-Hercules program by September 30, 1974. At the time of that announcement there were three Nike-Hercules Missile sites in Virginia[1] employing 291 technicians whose jobs would be abolished. The plaintiffs' duties basically were to care for, operate and maintain in a state of readiness the missile sites and the related equipment.

In preparation for the RIF, the Adjutants General of the affected states were called to Washington, D. C., and given general guidance concerning the reduction. A booklet was distributed which referred to Technician Personnel Pamphlet 910 (hereinafter TPP 910), a publication issued by the National Guard Bureau on March 1, 1973, pursuant to 32 U.S.C. § 709. TPP 910 was promulgated to provide guidance to states conducting a RIF. The Washington meeting and the explanatory booklet distributed at that meeting collectively and clearly expressed the National Guard Bureau's intention regarding the RIF: "It is the intent . . . that *every effort* be taken to retain career Reservist/Technicians in the program." (emphasis added). Additional funding was made available in order to reassign air defense technicians.

[1] The sites in Virginia were: Newport News, Chesapeake and Lorton.

Prior to the Washington meeting, the state National Guard units had been operating at less than the full personnel capacity because of a lack of funding for remaining authorized positions. The state Adjutants General were informed at the Washington meeting that the affected states were "authorized to reassign Air Defense technicians up to 100% of all existing positions on current manning documents for each activity." (i.e., appropriations were authorized to create more openings in the National Guard, boosting its membership to full capacity). This created 115 positions in Virginia. They also were instructed to follow the procedures outlined in TPP 910 in order to provide *maximum* placement assistance and retention of the displaced technicians.[2]

The National Guard Bureau issued numerous bulletins to supplement TPP 910. They stated clearly that TPP 910 was to be utilized to the fullest extent to give preferential treatment to those technicians faced with loss of their jobs. In these bulletins the states were told:

1. To identify all existing vacancies which could be filled by the displaced technicians and forward that list to the National Guard Bureau for dissemination among the ten air defense states;

2. That funds would be allocated in order to accept the transfer of "those Air Defense Technicians who might otherwise be eliminated from the program."

3. That each state will implement those policies and procedures outlined in TPP 910;

4. That funds would be "'authorized to reassign . . .

[2] Clearly, the guiding star initially announced by the National Guard Bureau and declared in TPP 910 was that in effecting the RIF, the displaced technicians would be cared for first.

[t]echnicians up to 100% of all existing positions . . . [in order to] provide for an opportunity for relocation of many of the affected technicians."

II.

Following the directives discussed above, General McCaddin, the Adjutant General of the Virginia National Guard, embarked upon a program designed to carry out TPP 910. The inactivation notice was given on February 4, 1974, but the men were assured that "every effort will be made to place the 291 Air Defense Technicians in positions." General McCaddin explained that he had been authorized 100% technician manning to be utilized in placing the affected technicians. Subsequent similar verbal assurances were given, the technicians were notified that there would be a complete and immediate freeze regarding all promotions, transfers, reassignments and new hires, and it was announced that pursuant to TPP 910, a placement program would be implemented.

However, a complete "about-face" was announced sixteen days after the inactivation notice. In a directive dated February 21, 1974, all pertinent provisions of the prior directives were rescinded and the freeze was discontinued. Instead of a preferred placement plan as contemplated by TPP 910 and the National Guard Bureau Bulletins, Virginia embarked on a merit promotion program. The displaced technicians were then forced to compete with non-affected technicians for vacancies. The merit promotion scheme which was utilized was one of four suggestions made by the National Guard Bureau. This change in policy resulted from meetings and consultations by General McCaddin and Wayne A. Robertson, Chief of Office Technician Personnel of the National Guard Bureau. They felt that the merit promotion plan would obviate morale problems with the

remainder of the Virginia National Guard, and the Virginia National Guard would suffer less in the long run.[3]

While the defendants assert that the merit plan was successful, the record discloses disastrous results. Of 291 displaced technicians only 77 were retained in the Virginia National Guard; 40 found positions in other states' guard programs; 74 relocated in other federal agencies; 13 retired; 2 entered active military service; and 85 resigned or were separated from the Guard. Moreover, 291 men knew on February 4, 1974, that if they had not been employed by September 30, 1974, (completion date of the RIF), they would be out of a job; but it took over three months for Virginia to guarantee the first job. With 8 days remaining in the RIF, only 22 men out of 291 had found a job in the National Guard.

On these facts, plaintiffs filed suit in the United States District Court for the Eastern District of Virginia, Newport News Division. The district court denied the relief sought. This appeal followed. Plaintiffs maintain that the lower court erred in holding that the Adjutant General acted within his discretionary authority in using merit promotion competition and argue that the defendants failed to follow TPP 910.

III.

We agree with the plaintiffs' contention that General McCaddin abused his discretion in not following TPP 910.

Title 32 U.S.C. § 709(e)(4) provides:

> (e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned . . .

[3] After completion of the merit promotion competition, the placement program as contemplated by TPP 910 was utilized for one day only.

> (4) . . . a reduction in force . . . shall be accomplished by the adjutant general of the jurisdiction concerned; . . .

In this case TPP 910 is the applicable and only secretarial regulation. While we agree with the district court that "the language in TPP 910 does not relegate the Adjutant General to a purely ministerial task of implementing its provisions in a perfunctory fashion," nevertheless, the Adjutant General must not lose sight of the main thrust of this regulation either.

Under the chapter "GENERAL," TPP 910 provides:

> A RIF is an extremely sensitive area of technician-management relations. The technician affected is faced with the possible loss of his livelihood and his capability to support his family. He faces an uncertain future, and the reduction of these uncertainties is deserving of top management's personal attention. Mere adherence to RIF regulations or procedures does not provide for a sound program and does not take into consideration the human aspect of the problem. *The technician must be assured that every effort humanly possible will be made to assist him in continuing employment.* . . . It is required that a meeting be arranged with the *technicians affected* and a *clear and intensive placement program be outlined.* . . . (emphasis added).

In chapter 2 of TPP 910, under the heading of "2-1. Obligations beyond requirements," discretionary language is included with the primary theme of the regulation:

> The obligation to provide maximum placement assistance [to displaced technicians] does not end with adherence to the minimum requirements set forth in regulations and procedures.

Chapter 5 of TPP 910 deals with the scope of competition among the displaced technicians:

> When a RIF is planned, the Technician Personnel Officer, acting on behalf of the State Adjutant General, should establish step-by-step actions to be taken to ensure maximum retention of the displaced technicians.
>
> The Technician Personnel Officer should fill authorized vacancies . . .
>
> The Technician Personnel Officer should establish the following four rounds of competition among the affected technicians. . . .

TPP 910 emphasizes a placement program; competition is discouraged except as a last resort:

> 2-4. Placement program results. A positive placement program will reduce or eliminate the necessity to execute a program of competition among technicians. . . .

[1] The plaintiffs' main objection is that the displaced air defense technicians were mandated to be placed in the 115 positions opened under the 100% manning authorization and that the rest of the technicians in the Virginia Guard should not have been allowed to compete for those positions. In keeping with the primary purpose of applicable regulation, we agree. To assure "maximum retention" of the displaced technicians, *all* authorized vacancies must be made available to this class only, and competition must be restricted among the same.

[2] As evidence of the primary purpose of TPP 910 as it related to the 115 job vacancies, we examine its objective as viewed by Major General Francis S. Greenlief, Chief of the National Guard Bureau. In a letter of August 16, 1974, two weeks after his retirement, General Greenlief re-

plied to an inquiry. He confirmed his prior directive in January of 1974 that the states conducting the RIF "could fill previously unfunded positions up to 100% authorized manning *provided they filled these positions with Air Defense Technicians who were to be eliminated.*" (emphasis added). While not dispositive, the statement by the Chief of the National Guard regarding his interpretation of TPP 910 while in office is accorded great weight. Robertson, who authorized McCaddin's actions, is considered the expert in the Guard's technician personnel matters; however, he was subordinate to General Greenlief. Robertson had no authority on his own to change the requirements of TPP 910, an established regulation upon which the technicians had a right to rely.[4]

[3] The freeze should have continued for the full duration of the RIF. The elimination of an entire national guard program was unique in effecting this RIF; however, this is no defense for non-compliance with TPP 910. The sixteen-day freeze on all promotions, transfers, reassignments and new hires was insufficient. Such a freeze is to be implemented in the planning stages of the RIF (section 5-1, TPP 910), but to comply with the obvious purpose of TPP 910, the freeze must be more than nominally evoked.

IV.

[4] From our examination of the record as a whole, we hold that the district court's findings are not supported by substantial evidence. We think the finding that defendants

[4] The record is not clear as to the method utilized by the other nine states conducting the RIF. Defendants say they used a scheme similar to that employed in Virginia, or that scheme in conjunction with other procedures. We are not apprised of their success in retaining technicians affected by the RIF.

did not abuse their discretionary authority is clearly erroneous, and the judgment below must be reversed. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948); *Taylor* v. *Local No. 7, Inter. U. of Journeymen Horseshoers*, 353 F.2d 593, 601 (4th Cir. 1965), *cert. denied*, 384 U.S. 969, 86 S.Ct. 1859, 16 L.Ed.2d 681 (1966); *Smith* v. *United States*, 336 F.2d 165, 168 (4th Cir. 1964).

[5] Failure to effectively follow TPP 910 constituted an abuse of discretion. The defendants were obligated to follow their own regulation. The rule is well established that: "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." *United States* v. *Heffner*, 420 F.2d 809, 811 (4th Cir. 1969), *citing United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) and other cases. *See also McCourt* v. *Hampton*, 514 F.2d 1365, 1370 (4th Cir. 1975); *Cross* v. *United States*, 512 F.2d 1212, 1218 n. 9 (4th Cir. 1975).

V.

With the reversal, we remand this case to the district court for entry of an appropriate order directing the defendants to prepare a schedule, subject to the court's approval, offering employment or reemployment to plaintiffs at no less than the grade each would have had if the competition for vacancies had been restricted to the displaced technicians in accordance with TPP 910. However, the United States will not be required to pay plaintiffs for wages lost due to failure to receive jobs as they were entitled, nor will defendants be held individually liable.

VI.

[6] Regarding the district court's denial of plaintiffs' motion to proceed as a class, we hold that the court did not abuse its discretion. We agree with the district court that the interests of the named plaintiffs would have been antagonistic to the interests of many of the unnamed members of the class, *Phillips* v. *Klassen*, 163 U.S.App. D.C. 360, 502, F.2d 362, 365-68 (1974), *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974), and accordingly class action certification in this case would have been inappropriate.

REVERSED AND REMANDED IN PART WITH DIRECTIONS; AFFIRMED IN PART.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

MARION H. MORRIS, et al.,
Plaintiffs,

v.

MAJOR GENERAL WILLIAM McCADDIN, et al.,
Defendants.

Civil Action No. 74-99-NN

MEMORANDUM OPINION

This action was originally instituted on October 11, 1974, by eighteen members of the Virginia Army National Guard, challenging the manner of a reduction in force when the Nike-Hercules Missile Program was abandoned in February 1974. The defendants are the Adjutant General of Virginia, the Secretary of Defense, the Secretary of the Army, and the Chief of the National Guard Bureau. From our Memorandum Order of April 23, 1976, which found adversely to the eighteen plaintiffs, an appeal was taken.

The Circuit Court of Appeals for the Fourth Circuit, by its decision of April 21, 1977, reversed the action of this Court and remanded the litigation with specific instructions.

After requiring the parties to submit the information required under the Fourth Circuit mandate, arguments, supplemented with briefs, were heard April 21, 1978.

I.

Initially, nine additional plaintiffs seek to be allowed to intervene.

Arguments by the defendants point to the early denial of a class action by this District Court and the specific affirmance of that ruling by the Fourth Circuit, the lapse of three (3) years since the institution of the suit, and the failure of these new prospective plaintiffs to have exhausted administrative remedies, are all urged as grounds to deny intervention. The plaintiffs argue that intervention is discretionary with the Court under Rule 24(b) of the Federal Rules of Civil Procedure; that for plaintiffs to file suit and seek consolidation with the present suit is inevitable; that judicial economy demands such intervention; and that exhaustion is a fruitless effort since the claim of all of those affected by the RIF in January 1974 have been denied.

We conclude that the plaintiffs may intervene. Their cause is exactly the same as their eighteen predecessors; they could certainly file a new suit and seek consolidation; exhaustion would be a hollow effort; and, even without consolidation, they could most probably seek relief comparable to that afforded the already active plaintiffs, and cite the present appellate decision in Morris, et al. v. McCaddin, et al., as *res adjudicata* for their claims.

II.

In reversing the judgment of the District Court, the Fourth Circuit explicitly said:

> "With the reversal, we remand this case to the district court for entry of an appropriate order directing the defendants to prepare a schedule subject to the Court's approval, offering employment or reemployment to

> plaintiffs at no less than the grade each would have if the competition for vacancies had been restricted to the displaced technicians in accordance with TPP 910 However, the United States will not be required to pay plaintiffs for wages lost due to failure to receive jobs as they were entitled, nor will defendants be held individually liable"

Pursuant to the order in the above language, the Court directed the defendants to submit a schedule "...offering employment or reemployment to the plaintiffs at no less than the grade each would have if the competition for vacancies had been restricted to the displaced technicians in accordance with TPP 910."

In preparing such a schedule, the Government reported that it had originally contemplated that the direction only encompassed the 115 "new" positions, *i.e.*, the positions existing on the roster, but which were left unmanned until the 100% authorization which accompanied the RIF. The manning authorization was obviously intended to ease the trauma of the abandonment of the Nike-Hercules Missile Program and its accompanying unemployment. In the schedule submitted, however, the Government has included all vacancies which arose through attrition during the RIF, *i.e.*, voluntary separations, retirements, etc. When thus augmented, the available positions to be considered rose from 115 to 185.

Attachment "A" is the schedule offered by the Government and in our opinion is in conformity with the appellate mandate. However, it does not take into account the nine additional plaintiffs who have been allowed to intervene. The defendants are to upgrade and resubmit the attachment, appropriately designating the slot thereon for the nine new plaintiffs. The schedule shall be resubmitted within fifteen (15) days from this date.

In accepting the defendants' proposed employment and reemployment schedule, we reject the plaintiffs' proposal that somehow, the offer of reemployment has to be made. Then whether or not the offer is accepted or rejected is to be cranked into a new schedule which must be the basis of a second offer of reemployment to the affected group. From these acceptances or rejections, a third offer would have to be made, etc. This, in our judgment, is not appropriate to the instructions on remand.

III.

With all the other noises being raised by plaintiffs, intervenors, and prospective intervenors waiting in the wings, the real impetus in the continued interest in this case is actually the claim for back pay.

In light of the specific directions of the Fourth Circuit, "[*h*]*owever, the United States will not be required to pay plaintiffs for wages lost due to failure to receive jobs as they are entitled*. . .", we do not linger long on the entreaties for back pay. Such claims are DENIED.

Upon receipt of the updated schedule, applying thereto the new nine intervenors, an Order will be entered in accordance with this Memorandum, to which the updated schedule will be appended as Attachment "B".

JOHN A. MACKENZIE
United States District Judge

Norfolk, Virginia
June 19, 1978

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

MARION H. MORRIS, et al.,
Plaintiffs,

v.

MAJOR GENERAL WILLIAM McCADDIN, et al.,
Defendants.

Civil Action No. 74-99-NN

ORDER

As requested in our Memorandum Opinion filed herein, June 21, 1978 (dated June 19, 1978), defendants have filed a Schedule of Reemployment which includes consideration of the nine new plaintiffs allowed to intervene by our prior Order above.

Accordingly, attached, as "Attachment AA" is such upgraded Schedule of Reemployment which includes all plaintiffs.

In accord with the Memorandum Opinion referred to above, we approve "Attachment AA' as an offer of "employment or reemployment to [all] plaintiffs at no less a grade each would have if the competition for vacancies had been restricted to the displaced technicians in accordance with TPP 910", as required by the mandate of the Circuit Court of Appeals for the Fourth Circuit dated April 21, 1977.

It is so ordered.

JOHN A. MACKENZIE
United States District Judge

Norfolk, Virginia
July 27, 1978

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 74-99-NN

MARION H. MORRIS, Et Al.,
Plaintiffs,

v.

MAJOR GENERAL WILLIAM McCADDIN, Et Al.,
Defendants.

MEMORANDUM ORDER

This suit, by eighteen plaintiffs, members of the Virginia Army National Guard, challenges the actions taken by the defendants as violative of the statutes and regulations in a reduction in force (hereinafter RIF) in the Nike-Hercules Missile Program in the Commonwealth of Virginia. The plaintiffs were formerly employees in the Nike-Hercules Missile Program, under the National Guard Technicians' Act of 1968. Their duties were too perate the missile sites and equipment. The Nike-Hercules Missile Program existed in ten states, in Virginia at three sites in Chesapeake, Newport News, and Lorton.

The defendants are the Adjutant General of the Virginia National Guard, the Secretary of Defense, the Secretary of the Army, and the Chief of the National Guard Bureau.

On January 11, 1974 the State Adjutants General and the State Air Defense officers from the ten states were informed that an announcement was soon forthcoming closing the Army National Guard Nike-Hercules units in the ten states. In preparation for this deactivation, the representatives were briefed and furnished a booklet containing guidance in personnel matters upon the closure of the units. The booklet contained reference to Technician Personnel Pamphlet 910 (hereinafter TPP 910), a publication which was issued by the National Guard Bureau (hereinafter N.G.B.) on March 1, 1973 pursuant to 32 U.S.C. § 709 and which provided guidance to states effecting a RIF; directions on manner of compliance with provisions of TPP 910, such as notice requirements; provisions that the procedures outlined in TPP 910 should be utilized to the extent possible, consistent with minimizing the adverse effects on displaced Air Defense Technicians; and an announcement by the N.G.B. that it intended to monitor the effectiveness of the procedures adopted by the ten states in effecting the RIF.

On February 4, 1974 the Department of Defense officially announced the elimination of the Nike-Hercules Missile Program throughout the United States, effective October 1, 1974. Likewise, Major General William J. McCaddin, the Adjutant General of Virginia of the Army and the Air National Guard, notified the three Virginia missile sites by letter on February 4 and by personal visit on February 5 of the inactivation of the Program. McCaddin's letter also referred to the 100% manning authorization, first mentioned in the booklet distributed at the January 11 meeting. Prior to this time the state National Guard units had been operating at less than the full personnel complement on their manning documents (i.e., authorized positions that were unfunded). Under the 100% manning authorization, the states were permitted to utilize 100% of

all existing positions on current manning documents for other National Guard activities to ease the economic impact of the closure of the Nike-Hercules Program. This created 115 positions in Virginia.

After the announcement of the closure, the Director for the Army National Guard, General LaVern E. Weber, on February 4, 1974, informed the various State Adjutants General of certain actions that could be taken to minimize the obvious adversity upon Nike-Hercules unit employees.

On February 5, 1974 Virginia put its plan into operation in a bulletin issued by the Virginia Technician Personnel Officer, Major Charles W. Howard, Jr. This memorandum outlined the steps that would be taken, which included a freeze on all promotions, transfers, reasignments, and new hires in the Virginia National Guard Technician Program, Army and Air; the utilization of a direct placement program in assisting the displaced air defense technicians; and the giving of general notice to all affected technicians of the planned RIF, as required by TPP 910.

On February 14, 1974 a bulletin was issued by the National Guard Bureau. The bulletin noted: "Each State will implement those polices and procedures outlined in Technical Personnel Pamphlet 910." The February 14 bulletin was followed by a memorandum on February 15, 1974 from Major General Francis S. Greenlief, Chief, National Guard Bureau, which reiterated the 100% manning authorization, encouraged all affected states via certain incentives to accept by transfer those technicians who might otherwise be eliminated from the program, and authorized the establishmer' of a master vacancy roster for assisting any intra-service transfers.

Upon further meetings and consultations by McCaddin and Howard with Wayne A. Robertson, Chief, Office Technician Personnel of the National Guard Bureau and with Mr. Robertson's staff, the Virginia State Adjutant General considered three other RIF options, suggested by the N.G.B., that were alternative to a pure placement method. After these staff meetings and further coordination, McCaddin determined that the RIF in Virginia should be accomplished by a merit promotion program. This plan called for the announcement of all vacancies within the Virginia Army National Guard technician program, including the recently funded vacant positions under the 100% manning authorization, and the allowance of all Group I technicians in the state, as well as the Air Defense Technicians, to apply for those positions. This approach met with the approval of Mr. Robertson and his staff, who were the promulgators of TPP 910.

On February 21, 1974 this new program was announced in a directive issued by Major Howard, the Virginia Technician Personnel Officer, to the affected Virginia units. The bulletin rescinded the pure placement plan that was declared in the directive of February 5, 1974, including the across-the-board freeze on all promotions, transfers, reassignments, and new hires in the Virginia National Guard Technician Program. The freeze was continued, however, for most new hires.

Following Virginia's change of plan, various bulletins were issued in March and April 1974 by the National Guard Bureau in Washington.

On June 14, 1974 the Virginia Adjutant General's Office issued a memorandum formulating selection procedures in filling technician vacancies, and setting forth with specificity the procedures that would be utilized in conducting the merit promotion program.

The Virginia Adjutant General Office issued the specific

notice of the reduction in force on July 1, 1974. At the completion of the merit promotion program at the end of September, a placement program was instituted against the remaining vacancies for the technicians who had not received employment as a result of the merit promotion program.

The State of Virginia's program for dealing with the reduction in force affected 291 Air Defense Technicians. The results of the RIF were as follows: 77 technicians were retained in the Virginia National Guard in non-Air Defense units. 40 were placed in other States' Guard programs, 74 were placed in other Federal agencies, 13 retired under the Federal Civil Service System, 2 entered active military service, and only 85 resigned or were separated.

The plaintiffs focus their complaint on TPP 910, a regulation promulgated by the National Guard Bureau pursuant to 32 U.S.C. § 709(e)(4). They contend that TPP 910 is the governing regulation for all reductions in force and the law mandates adherence to that regulation. In this instance, it is argued that the regulation was not followed. The plaintiffs maintain that there was no support in TPP 910 for the action taken by Virginia in conducting the RIF.

The plaintiffs view TPP 910 as requiring a direct placement program into authorized vacancies for the affected individuals, and not a merit promotion or competition program as Virginia instituted. They also complain of the omission of a retention register and of the failure to "freeze" all authorized and funded vacancies and promotions within the state.

As to the various bulletins, the plaintiffs argue that these directives were not pursued arduously enough or were not

followed at all. They contend that the job vacancies created by the 100% manning authorization should have been marked for competition among the displaced technicians only and not for all the technicians in the Virginia Guard and that retraining was minimal.

The defendants respond that there was discretionary authority under the statute, TPP 910, and the bulletins pursuant thereto for the actions they took in conducting the reduction in force. Given this discretionary authority, the defendants contend that the only consideration for this court is whether there was a patent abuse of this discretionary authority and maintain that the record shows no such abuse.

As to the plaintiffs' complaint that all of the provisions of TPP were absolute and mandatory upon McCaddin and that there was no authority for a merit promotion program in conducting the RIF, we disagree.

From a fair reading of the statute which authorized TPP 910 and TPP 910 itself, we find that TPP 910 was not meant to be mechanical in its application, and that the Adjutant General was accorded wide discretionary authority in planning reductions in force. We find that the Adjutant General did not abuse this discretion in his planning and conducting the RIF.

Title 32 U.S.C. § 709(e)(4) provides:

> "(3) Notwithstanding any other provision of law and *under regulations prescribed by the Secretary concerned*—. . . . (Emphasis added.)
>
> "(4) . . . a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be *accomplished by the*

> *adjutant general of the jurisdiction concerned*; . . . (Emphasis added.)

Thus in the statute discretionary authority is vested in the Adjutant General to oversee and plan reductions in force and is limited only by regulations promulgated by the Secretary. In this case TPP 910 is an applicable regulation for reductions in force.

In viewing TPP 910, we find that the language does not regulate the Adjutant General to a purely ministerial task of implementing its provisions in a perfunctory fashion. Its purpose is to provide guidance in planning and conducting a RIF. In Chapter 1 under the heading of "Purpose," the language reads:

> "This pamphlet provides a program designed *to assist* the State in the proper and orderly transition of technicians in the event of a reduction in force (RIF) and *emphasizes the human factor* that is obviously present during such actions. *Each state will implement* the *policies* set forth in this pamphlet *in preparing State RIF plans*." (Emphasis added.)

In that same chapter under the heading of "General" is the following:

> "A RIF is an extremely sensitive area of technician-management regulations. . . . *Mere adherence* to RIF regulations or procedures does not provide for a sound program and does not take into consideration the human aspect of the problem." (Emphasis added.)

Chapter 2, under the heading of "2-1. Obligations beyond requirements," contains similar permissive language:

> "Good personnel practices require a State, to the fullest extent of its resources, to carry out the role of a good employer who shows his concern for the problems and

> interests of the affected technicians. Since a RIF threatens the technicians economic security, *whatever the state can do* to help relieve this insecurity is to its benefit in terms of morale and good employer-technician relationships. *One of the methods* most successful in achieving these results is the implementation of placement programs. . . ." (Emphasis added.)

Other instances of permissive language can be found throughout the manual. (*See* 2-2, 5-1, 5-2, 5-7.) The tenor of the instrument as a whole indicates that its primary purpose and function was to provide guidance and that it was not meant to be mechanically applied. Thus, the Adjutant General was accorded general discretionary authority under the statute and TPP 910 was in the planning and conducting of reductions in force.

Even though we find that the Adjutant General possessed considerable latitude in handling a RIF, such general discretion was not boundless. There were certain mandatory provisions and policies in TPP 910 that were incumbent upon the Adjutant General. These provisions and policies were: the implementation of the general and specific notice requirements of Chapter 6 of TPP 910, the "freezing" of all authorized and funded vacancies and promotions within the state during the planning stages of the reduction in force, and the establishment of a retention register. Plaintiffs contend that the implementation of a direct placement program for the displaced technicians into the newly-funded vacancies was a mandatory provision under TPP 910 and various of the bulletins. Upon examination, we reject the plaintiffs' contention and find that the defendants did not abuse their discretion with respect to the mandatory provisions and policies.

The gist of plaintiffs' position is that the *displaced air defense technicians were mandated to be in the 115 posi-*

tions opened under the 100% manning authorization and that the rest of the technicians in the Virginia Guard should not have been allowed to compete for those positions. A close look at TPP 910, however, indicates that the Adjutant General was given discretionary authority specifically in the area of filling authorized vacancies. (*See* 5-2.)

Chapter 2, which is the placement program section of TPP 910 and which the plaintiffs maintain was not followed with respect to the 115 positions, deals with direct placement in other organizations *outside* of the State Guard which is involved in the RIF and not placement within the particular State Guard conducting the RIF. For if there are any authorized vacancies within the Guard conducting the RIF, these positions must be filled not by placement under Chapter 2, but by competition as required in Chapter 5, entitled "Scope of Competition." (*See* 5-2.) This fact becomes particularly evident when one realizes that there were 291 displaced technicians and only 115 newly funded positions. Furthermore, the entire emphasis on placement in Chapter 2 and in TPP 910 is to reduce competition, and this can be best accomplished by the placement of as many of the displaced personnel in organizations outside of the particular Guard that is conducting the RIF so that a lesser number will have to compete for the remaining vacancies or positions within the Guard. The defendants did implement a direct placement program as encouraged by TPP 910 which resulted in the placement of 50 technicians in other States' Guard programs and 74 technicians in other Federal agencies.

Section 5-1 of Chapter 5, entitled "General," reads:

> "When a RIF is planned, the Technician Personnel Officer, acting on behalf of the State Adjutant General, *should* establish step-by-step actions to be taken to *ensure maximum retention* of the displaced technicians." (Emphasis added.)

And in Section 5-2, entitled "Authorized Vacancies",

> "The Technician Personnel Officer *should* fill authorized vacancies based on the following criteria. . . ." (Emphasis added.)

This language is permissive in nature, and the Adjutant General is accorded discretion under TPP 910 in determining the manner in which authorized vacancies can be filled to ensure maximum retention. This being the case, there was no violation of TPP 910 in the action taken by McCaddin with respect to the 115 positions.

Plaintiffs contend that certain letters in the course of the reduction in force support their argument that the 115 newly funded positions were to be filled only by the displaced air defense technicians. Specifically they point to the February 5 letter of General McCaddin announcing the RIF and the August 16 letter of then retired General Greenlief to Virginia State Delegate Diamonstein. We do not find these dispositive. The booklet which was handed out at the initial meeting in Washington on January 11 and which first mentioned the 100% manning authorization states the following:

> "Your State *is authorized* to reassign Air Defense technicians up to 100% of all existing positions on current manning documents for each activity." (Emphasis added.)

The February 4 bulletin of Major General LaVern E. Weber, Director of the Army National Guard, notes:

> "Air Defense Technicians may be employed in any

vacant position in the State *for which they are qualified.*" (Emphasis added.)

In the February 15 directive of General Greenlief, it is stated:

> "In addition to normal personnel placement assistance, the States that are affected by the reduction in force in the Army National Guard *will be authorized to* reassign ARNG Air Defense Technicians up to 100% of all existing positions on current manning documents for each activity." (Emphasis added.)

Finally Mr. Wayne A. Robertson, Chief of the Office of Technician Personnel for the National Guard Bureau in Washington, promulgator of TPP 910, and adviser to the affected States in handling the reduction in force, stated in his deposition:

> So, consequently, when the States were allowed to go to 100%, the States were, you could not say that the positions were identified and locked in for the Air Defense people. The States were allowed to go to 100 percent to accommodate the Air Defense people the best way they saw fit. (Robertson Deposition, at page 12.)

The permissive language in the cited bulletins, the deposition of Mr. Robertson, the permissive language in TPP 910, and the language in the statute all indicate that the Adjutant General was accorded discretion in the filling of the authorized vacancies and that there was no mandatory provision that those positions be occupied only by the displaced technicians. The merit promotion program under which the air defense technicians competed for the newly funded positions was not a violation of TPP 910.

As to the mandatory provisions of the notice requirements and of the across-the-board freeze on promotions, transfers, reassignments, and new hires during the planning state, the defendants fully complied. On February 5, in a bulletin from Major Charles W. Howard, Jr., Technician Personnel Officer for Virginia, the general notice was issued, and on July 1 the specific notice was sent out. An across-the-board freeze on promotions, transfers, reassignments, and new hires in the Technician Program, Army and Air, was instituted on February 5 when Virginia put its placement plan into operation. On February 21 Virginia went to a merit promotion program and adjusted its original freeze to a freeze on all new hires. Section 5-1 of TPP 910 requires the freeze to be implemented in the planning stage of the reduction in force before the program is put into effect, and this was accomplished by the February 5 and February 25 directives. The establishment of a retention register is another provision of TPP 910 which is stated in mandatory language; however the defendants did not implement such a register. The failure of the defendants to establish a retention register, as provided in TPP 910, was a result of the unique nature of this particular reduction in force in which an entire competitive area of all the air defense technicians was being eliminated. A retention register was therefore of no use, as it might have been in a reduction in force that only partially eliminated employees.

Finally, we feel that a review of the various steps and procedures followed by the Virginia National Guard in planning and conducting its reduction in force demonstrated clearly that the program as utilized was a sound one which lived up to the broad policy guidelines embodied in TPP 910. The merit promotion program was

not hastily conceived or planned. After the announcement on February 5 of the "pure placement" program, the Adjutant General met with the affected technicians and continued to consider the feasibility of the plan. The Technician Personnel Office maintained daily contact with the National Guard Bureau to obtain guidance and approval of the particulars of Virginia's RIF plan. A representative of the National Guard Bureau was sent to Virginia during this period to consult and discuss the four options McCaddin had in actually implementing the RIF, one of which was the merit promotion program. It was obvious that the merit promotion option would maximize the retention of the displaced Air Defense Technicians and minimize the adverse effects of the reduction in force throughout the state. The program utilized by Virginia met with the approval of and was supported by the office of Technician Personnel of the N.G.B. in Washington. This office was the promulgator and proponent of TPP 910 and had the obligation to guide and assist the ten affected states in conducting their particular RIF. *In fact, every one of the ten states used merit promotion procedures* either alone or in conjunction with other procedures to effect the filling of previously authorized funded and unfunded technician positions.

If, as contended by the plaintiffs, a direct placement of the air defense technicians into the 115 newly funded positions had been used, many less Air Defense Technicians would ultimately have been placed. The grade structure of the available positions was such that a majority of displaced technicians were not employed in comparable wage grade jobs allowing for placement into the newly funded positions. Under the Civil Service regulations, utilizing a direct placement program, an individual could only

be placed in the same or lower grade job; whereas under the merit promotion program, displaced technicians were given the opportunity to compete for the higher grade level jobs. It followed that as non-Air Defense Technicians were promoted into the positions under the merit promotion program, vacancies occurred at job grade levels into which displaced Air Defense Technicians could be employed. The defendants' statistics bear out the success of the program used:

> "Of the 115 available positions there were only 9 positions available for wage grade 07 employees and only 6 additional positions were created as a result of separations. Thus, there were only 15 positions available for placement of wage grade 07 employees. Utilizing merit promotion procedures, 14 non Air Defense technicians having a wage grade 07 were reassigned thus opening up an additional 14 wage grade 07 positions for employment of displaced Air Defense Technicians. As a result, 25 wage grade 07 displaced Air Defense Technicians were employed within the Virginia National Guard, significantly more than could have been employed utilizing a placement program."

As part of the merit promotion program the Virginia National Guard instituted a retraining program. The Virginia Guard sought additional funding for the 3rd and 4th Quarters FY 1975, and priority in training was made available to the displaced Air Defense Technicians. As of the fall of 1975, 36 air defense technicians had been retrained and funds had been committed to train 10 additional technicians. The Virginia National Guard Budget for FY 1976 sought $46,440.00 to support the training of the remaining 31 Air Defense Technicians.

Extensive assistance was afforded the displaced Technicians in obtaining employment outside of the Virginia

Guard, in accordance with Chapter 2 of TPP 910. The Technician Personnel Office made inquiries by letter and telephone, and efforts were directed primarily toward Federal Government installations as the displaced technicians skills were more aligned with positions in the federal sector. The Norfolk area office of the U.S. Civil Service Commission notified all Federal personnel offices within their jurisdiction that the Virginia Army National Guard was involved in a reduction in force. The Technician Personnel Office contacted over 100 federal offices in the Northern Virginia and Washington, D. C. areas alerting each office of the RIF. The Virginia Employment Commission was also notified of the RIF.

After completion of the merit promotion program, a direct placement program was instituted against the remaining vacancies. This consisted of making job offers of the remaining vacant positions to technicians who had not received employment as of yet.

As a result of Virginia's program 77 technicians were retained in the Virginia National Guard in non-Air Defense units, 40 were placed in other States' Technician programs, 74 were placed in other Federal agencies, 13 retired under the Federal Civil Service System, 2 entered active military service and only 85 resigned or were separated. As the defendants note, these figures do not reflect the numerous job offers that were extended to affected technicians but were rejected by technicians not wanting to relocate out of the Tidewater or Lorton, Virginia areas. The defendants also point out that only 9 of the 291 displaced technicians affected by the RIF action raised any formal objections, and only 4 of the 9 complaints were filed by plaintiffs in the instant suit. As can be seen from this review of the steps taken by the defendants, the merit promotion pro-

gram was a sound one which lived up to the broad policy considerations embodied in TPP 910, and given the considerable discretion of the Adjutant General in conducting and planning reductions in force, we can find no abuse of that discretion.

The complaint is DENIED, with defendants to recover their costs.

It is so ORDERED.

JOHN A. MACKENZIE
United States District Judge

Norfolk, Virginia
April 21st, 1976

APPENDIX F

PERTINENT STATUTORY PROVISIONS

The pertinent provisions of the Back Pay Act, 5 U.S.C. § 5596, as amended by 89 Stat. 1025, 92 Stat. 1216, are set forth below:

(a) For the purpose of this section, "agency" means—

(1) An Executive agency;

* * *

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

(i) annual leave restored under this paragraph which is excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

APPENDIX G

DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1592

Marion H. Morris, et al.,

Appellants,

versus

Major General William T. McCaddin, et al.,

Appellees.

ORDER

Upon consideration of the petition for rehearing and with the concurrence of Judge Russell and Judge Breitenstein,

It is ordered that the petition for rehearing be, and it hereby is, denied.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

June 11, 1979
Filed June 13, 1979

APPENDIX H

CHAPTER 7 OF TECHNICIAN PERSONNEL PAMPHLET 910

CHAPTER 7

APPEALS AND CORRECTIVE ACTION

7-1. Technician appeal. A competing Technician may appeal to the State Adjutant General when he has received a specific notice of a RIF and he believes that the State incorrectly applied the provisions of the RIF plan. He may appeal anytime after he receives the specific notice but not more than 15 calendar days after the effective day of the action.

7-2. Extending the time limit. The State Adjutant General may extend the appeal time limit when the appellant indicates that he was not notified of the time limit and otherwise was not aware of it or that circumstances beyond his control prevented him from appealing in the time limit.

7-3. Basis for appeal. A technician may appeal an RIF action based on the following reasons:

a. Insufficient notice.

b. Improper tenure grouping.

c. Technician service errors.

d. Failure to state reasons for exceptions to the RIF plan.

e. Failure to permit the technician to review pertinent regulations and the retention register.

f. Failure to comply with the RIF plan issued by the State.

7-4. Decision on the appeal. The State Adjutant General issues a written decision and where applicable, directs the Technician Personnel Officer to take any necessary corrective action. A copy of the decision is forwarded to the

appellant with a statement of the corrective action to be taken. The decision of the Adjutant General is final, and there is no further right of appeal.

7-5. Corrective action. The decision of the State Adjutant General may require the Technician Personnel Officer to take corrective action as follows:

a. Correct the retention register.

b. Correct the technician's specific notice.

c. Restore the technician to his former grade or pay level when the technician was reduced improperly in grade or pay.

d. Restore the technician to duty and pay status when the technician was improperly placed on leave without pay.

e. Recall the technician to duty and pay status when he was furloughed improperly without pay.

f. Restore to the rolls, without loss of tenure or status when the technician was separated improperly. In this case the technician must be—

(1) Restored to the position from which separated or one of like seniority, status and pay.

(2) Restored to the position he should have been assigned to in lieu of separation or one of like seniority, status and pay.

7-6. Errors not prejudicial to the technician. If a technician appeal uncovers an error not prejudicial to the technician, in that the RIF action would have ensued in the manner it did regardless of the error, the State Adjutant General may require action to correct the error without requiring restoration or recall of the technician.

7-7. Reimbursement of back pay. Pay, allowances or differentials lost to the technician as a result of improper RIF actions will be reimbursed upon correction of the action.

Supreme Court, U.S.
FILED
OCT 25 1979
MICHAEL RODAK, JR., CLERK

No. 79-392

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARION H. MORRIS, ET AL., PETITIONERS

v.

MAJOR GENERAL WILLIAM T. MCCADDIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App.1-2) and the district court (Pet. App. 13-16) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1979. A petition for rehearing was denied on June 11, 1979. The petition for a writ of certiorari was filed on September 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Air Defense technicians whose jobs were abolished, but who then successfully claimed that they were entitled to be reemployed in different positions,

are entitled to back pay and other retroactive employment benefits for the period between their termination as technicians and appointment to new positions.

STATUTE INVOLVED

The Back Pay Act, 5 U.S.C. 5596(b), provides in relevant part:

> An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—
>
> (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel-action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and
>
> (2) for all purposes, is deemed to have performed service for the agency during that period * * *.

STATEMENT

1. On February 4, 1974, the Department of Defense announced that the Nike-Hercules Missile Program would be terminated on September 30, 1974. As a result, the jobs of 291 National Guard technicians employed at three Nike-Hercules missile sites in Virginia were to be abolished. Pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. 709(e)(4), this reduction in force

was to be accomplished by the Adjutant General of the Virginia National Guard under regulations prescribed by the Secretary of the Army. The Secretary furnished the Virginia Adjutant General with a booklet entitled "Technician Personnel Pamphlet 910" [hereinafter "TPP 910"] for guidance in finding jobs for displaced technicians (Pet. App. 5). The Virginia Adjutant General concluded that the displaced technicians should not receive a preference in filling future vacancies in Virginia National Guard units. He determined that a merit promotion plan should be instituted instead because "the merit promotion plan would obviate morale problems with the remainder of the Virginia National Guard, and the Virginia National Guard would suffer less in the long run" (Pet. App. 6-7).

On October 11, 1974, several of the displaced technicians filed this lawsuit in the United States District Court for the Eastern District of Virginia, claiming that the failure to offer them reemployment in other state National Guard units violated TPP 910 (Pet. 3). The district court upheld the actions of the Virginia Adjutant General, concluding that (Pet. App. 32-33):

> [T]he merit promotion program was a sound one which lived up to the broad policy considerations embodied in TPP 910, and given the considerable discretion of the Adjutant General in conducting and planning reductions in force, we can find no abuse of that discretion.

The court of appeals reversed in part, holding that the Virginia National Guard was bound by the provisions of TPP 910, which required state guard units "to the fullest extent to give preferential treatment to those technicians faced with loss of their jobs" (Pet. App. 5; 553 F.2d 866).[1]

---

[1]The district court had denied petitioners' motion to proceed as a class, and the court of appeals affirmed (Pet. App. 12).

The court of appeals directed the district court on remand to enter "an appropriate order directing the defendants to prepare a schedule, subject to the court's approval, offering employment or reemployment to plaintiffs at no less than the grade each would have had if the competition for vacancies had been restricted to the displaced technicians in accordance with TPP 910" (Pet. App. 11). The court held, however, that "the United States will not be required to pay plaintiffs for wages lost due to failure to receive jobs as they were entitled, nor will defendants be held individually liable" (*ibid.*).

Pursuant to the mandate of the court of appeals, the Virginia Adjutant General prepared and presented to the district court for its approval an employment and reemployment schedule.[2] The district court concluded that the schedule offered by the government conformed to the mandate of the court of appeals and, after the schedule was amended to take account of nine additional plaintiffs who were allowed to intervene, it was approved (Pet. App. 15-17). The court of appeals affirmed (Pet. App. 1-2).

ARGUMENT

Petitioners contend (Pet. 8) that they are entitled to a retroactive award of wages and other emoluments of employment under the Back Pay Act, 5 U.S.C. 5596(b),

[2]The vacancies were listed in descending order, as were the displaced technicians. These two lists were then combined so that the best (*i.e.*, highest grade and highest paying) vacancy could be offered to the best (*i.e.*, highest graded, highest paid, most senior) displaced technician. Petitioners' suggestion that this Court should reexamine the reemployment schedule (Pet. 11) is without merit. The schedule approved by both the district court and the court of appeals is well within the discretion of the Adjutant General under TPP 910. See *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Cortright* v. *Resor*, 447 F. 2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972).

for the period between their termination as technicians with the Nike-Hercules Missile Program and their reemployment in other National Guard positions.[3] Petitioners argue that the refusal to award back pay in this case is in conflict with this Court's decision in *United States* v. *Testan*, 424 U.S. 392 (1976), and with decisions of other courts of appeals.

Petitioners' contention that they are entitled to back pay under 5 U.S.C. 5596(b) overlooks the fact that the statute applies to wrongful separation but does not apply to wrongful failures to appoint or wrongful failures to reclassify personnel to new job positions. *United States* v. *Testan, supra*, 424 U.S. at 402-405. In *Testan*, the Court held that the Back Pay Act was inapplicable in a case where the claimant contended that he had "been denied the benefit of a position to which he should have been, but was not, appointed." 424 U.S. at 402. The Court noted that "[t]he established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. *United States* v. *McLean*, 95 U.S. 750 (1878); *Ganse* v. *United States*, 180 Ct. Cl. 183, 186, 376 F. 2d 900, 902 (1967)." 424 U.S. at 402. Because petitioners' claims in this case are based upon an alleged entitlement to an appointment to new positions, and not upon a wrongful discharge from their prior positions as Nike-Hercules missile technicians, they are not entitled to back pay under 5 U.S.C. 5596(b).

[3]It is not evident from the petition whether any of the 27 petitioners actually lost pay or emoluments due to the fact that the employment offered pursuant to the order of the court was not offered earlier. If not, they would lack standing to raise their claim at this time.

The decision of the court of appeals is consistent with the decisions of other circuits following *Testan*. See, *e.g.*, *Donovan* v. *United States*, 580 F. 2d 1203 (3d Cir. 1978); *Hill* v. *United States*, 571 F. 2d 1098 (9th Cir. 1978).[4] There is thus no conflict among the circuits to warrant further review.

---

[4]The Court of Claims' decisions on which petitioners rely (Pet. 8-9) were all decided without the benefit of this Court's decision in *Testan*. To the extent that they are inconsistent with *Testan*, they should not be followed. Indeed, one of the cases cited by petitioners (*Ainsworth* v. *United States*, 399 F.2d 176 (Ct. Cl. 1968)) was distinguished in *Testan*, where the Court stated (424 U.S. at 407):

> *Ainsworth* v. *United States*, 185 Ct. Cl. 110, 399 F. 2d 176 (1968) (cited by *amici*), involved the rights of an employee who had been discharged and subsequently reinstated.
>
> [*Ainsworth* does not provide] a reason for doubting that the Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position.

Petitioners' contention that they should be paid back wages under TPP 910 itself (Pet. 9 n.5) not only misconstrues that pamphlet but also overlooks the point that only Congress can waive sovereign immunity. See *United States* v. *Testan, supra*, 424 U.S. at 403:

> There is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other. See *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

See also *Hill* v. *United States, supra*, 571 F. 2d at 1101. The case of *Chambers* v. *United States*, 451 F. 2d 1045 (Ct. Cl. 1971), relied upon by petitioners (Pet. 9 n.5), was distinguished in *Donovan* v. *United States, supra*, because it was decided "before *Testan* and under provisions other than the Back Pay Act * * *." 580 F. 2d at 1208 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1979